STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2010
v	No. 290744 Wayne Circuit Court
JOAN GORDON-COOK, Defendant-Appellant.	LC No. 08-011847-FH

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by right her bench trial convictions of felonious assault, MCL 750.82, domestic violence, MCL 750.81(2), and simple assault, MCL 750.81(1). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant Tyray Johnson testified that he and defendant had dated "on and off" for four years. On August 18, 2008, defendant called Johnson at approximately 6:00 p.m. to arrange a meeting with him, and the two of them then met. Defendant, who had allegedly "had Johnson arrested" in the past on fabricated charges, told Johnson that she wanted to apologize, wanted him to forgive her, and wanted to reunite with him. He refused. She drove away, and Johnson went home. Defendant later called Johnson at home, apologized again, and asked him to come to her house. As he arrived, defendant and a male stepped off of the front porch. Johnson, defendant, and the other individual entered into a somewhat heated discussion. While Johnson remained seated in his car, defendant turned around and grabbed a landscaping brick. Johnson testified that defendant swung the brick at him. Johnson thought defendant was trying to smash the windows of his car. He blocked her swings twice with his left forearm. Defendant swung the brick again, and it slipped out of her hand, hitting Johnson in the chest and landing on the console of the car. Johnson started to drive away, telling defendant that he planned to call the police. He then returned home.

Johnson maintained that as he backed into his driveway, defendant sped down the street in her truck. Defendant pulled up in front of his house and threatened him. Defendant then returned home, but approximately three minutes later, defendant again drove to Johnson's home and exited her truck, carrying a hammer. She walked up to the front of Johnson's car and came around to the driver's door. Johnson, who thought that defendant intended to hit his car with the hammer, told her to go ahead, told her that she was going to jail, and rolled up his window. Defendant held the hammer above her head and then swung it downward a number of times,

verbally threatening to kill Johnson. Johnson stated that defendant could have "gotten to him" but the fact that he had his window rolled up made it a little harder for her. He stated that she gestured with the hammer for four or five minutes. Johnson noticed that the police were arriving at the scene, and he left his car and flagged down the police. Defendant put the hammer in her truck. After Johnson told the police about the assault and where defendant had placed the hammer, the police arrested her, searched the truck, and retrieved the hammer. They also retrieved the brick from Johnson's car.

Detroit Police Officer Andrew Zynda corroborated a portion of Johnson's account. He testified that as he arrived he saw defendant walk to her truck. He also observed that Johnson had some recent abrasions on his left forearm. He testified that he spoke with a witness at the scene who also stated that defendant had struck Johnson with a brick.

Defendant was charged with two counts of felonious assault and domestic violence. The trial court found Johnson's version of the initial assault credible, concluding that it was supported by the testimony of Officer Zynda. However, the trial court found defendant guilty of the lesser offense of simple assault as to the second altercation involving the hammer.

Defendant first argues that the prosecutor presented insufficient evidence to support her convictions. She also maintains that because the prosecution did not present sufficient evidence to support any of the charges, defense counsel rendered ineffective assistance by failing to move for a directed verdict at the close of the prosecution's proofs.

No special action is needed to preserve for appeal a challenge to the sufficiency of the evidence. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). However, because defendant did not move for a new trial on the basis of ineffective assistance of counsel and failed to request a *Ginther*[1] hearing before the trial court, her ineffective assistance of counsel claim is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

With respect to the argument that the evidence was insufficient to sustain the convictions, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417,

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Simple assault is "an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995) (internal quotation marks and citation omitted). The elements of felonious assault include an assault with a dangerous weapon and "the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Felonious assault is "a simple assault aggravated by the use of a weapon." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). The elements of domestic violence require proof "that the defendant and the victim are associated in one of the ways set forth in MCL 750.81(2) . . . and that the defendant either intended to batter the victim or that the defendant's unlawful act placed the victim in reasonable apprehension of being battered." *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). Battery has been defined as "'an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.'" *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004), quoting *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

The prosecution presented sufficient evidence for a factfinder to reasonably conclude that defendant was guilty of committing two assaults, one for her use of the brick to injure Johnson, and one for her later threats while swinging the hammer as she stood next to his car. Johnson's testimony provides sufficient evidence that defendant intended to strike him, and did strike him, with the brick. If believed, it also provided sufficient evidence for a factfinder to conclude that defendant intended to at least place Johnson in reasonable apprehension of a battery when she threatened to kill him while wielding the hammer in a threatening manner.[2] Johnson also testified that defendant approached his car and could have struck him or his car with the hammer, although it would have been difficult to reach him in the car with his window rolled up. When this testimony is reviewed in the light most favorable to the prosecution, it was sufficient to support the two assault convictions. In addition, because defendant admitted to her relationship with Johnson, the same testimony, which supports a finding of guilt as to the assaults, supports the conviction for domestic violence. MCL 750.81(2).

Defendant's arguments on appeal essentially amount to a claim that, because Johnson's testimony lacked credibility and was contradicted by defendant's testimony, and partly by her daughter's testimony, the prosecution presented insufficient evidence to support the convictions beyond a reasonable doubt. Defendant's assertion is incorrect because this Court will not

[2] We believe that the trial court would have been justified in finding defendant guilty of felonious assault as to the second altercation involving the hammer, not just a simple assault. We note that some of the trial court's factual findings regarding the second assault could arguably be viewed as being inconsistent with a guilty verdict of simple assault. However, defendant makes no such argument on appeal. Moreover, while the court's simple assault verdict leaves us a bit puzzled, the court's finding that defendant did not swing the hammer quite close enough to actually strike Johnson before the police arrived does not necessarily require a conclusion that Johnson was not placed in fear or reasonable apprehension of receiving an immediate battery.

interfere with the trier of fact's role of determining the credibility of witnesses, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), and because any and all conflicts in the evidence must be resolved in favor of the prosecution, *Terry*, 224 Mich App at 452. In addition, defendant downplays the corroboration of at least part of Johnson's testimony by Officer Zynda's observation of Johnson's injuries, defendant's actions as he arrived at Johnson's house, and the discovery of the brick and hammer. Zynda also testified, without objection, that he spoke with a witness who stated that defendant approached Johnson's car and struck him with a brick.

Finally, because the prosecution presented sufficient evidence to support each of defendant's convictions, she cannot show that counsel rendered ineffective assistance by failing to move for a directed verdict at the close of the prosecution's proofs. Counsel is not ineffective for failing to argue frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens